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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X

HAMBURG –SUD NORTH AMERICA, INC.,
HAMBURG-SUD BRASIL LTDA,
and HAMBURG SUDAMERIKANISCHE
DAMPFSCHIFFAHRTS GESELLSCHAFT
KA.,

Plaintiffs,

-against-

BOMIX INDUSTRIA DE EMBALAGENS
LTDA

Defendants.

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Index No: 10 Civ. 4559

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT TO DETERMINE ENFORCEABILITY OF CONTRACT TERMS AND CONDITIONS

HAMBURG-SUD NORTH AMERICA, INC., HAMBURG-SUD BRASIL LTDA and HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS GESELLSCHAFT KA., (hereinafter "HAMBURG–SUD NORTH AMERICA," "HAMBURG-SUD BRASIL" and "HAMBURG-SUD AMERIKANISCHE," respectively), the plaintiff/petitioners herein, by their attorneys DOUGHERTY RYAN GIUFFRA ZAMBITO & HESSION, bring this Complaint for Declaratory Judgment, for an Order to enforce certain ocean contract and bill of lading Terms and Conditions against Defendant/Respondents BOMIX INDUSTRIA DE EMBALAGENS LTDA (hereinafter "Bomix"), and for an Order to limit plaintiffs' liability for any loss or damage to goods owned, shipped by, consigned to or received by these defendants, as more fully specified below, to the sum of ONE THOUSAND DOLLARS ($1,000.00), pursuant to the Terms and Conditions of said ocean contract and bill of lading, and the provisions of the United States Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), (codified at 46 U.S.C. § 30701 et seq.), which law governs and applies to the performance of said contract and the rights, duties, responsibilities and immunities of the parties to this litigation.

THE PARTIES

1. Plaintiff/petitioner HAMBURG-SUD NORTH AMERICA, INC., is a corporation duly registered and licensed to do business within the State of New York, with a principal place of business at 465 South Street, Morristown, New Jersey, 07960, and, as general agent for HAMBURG-SUD AMERIKANISCHE, issued the contract of carriage or bill of lading SUDU280017845018, dated December 7, 2008, annexed hereto as Exhibit "1", under which the defendant BOMIX was a "merchant" as defined by the Terms and Conditions of said contract of carriage, whose goods were shipped as later described herein. HAMBURG-SUD NORTH AMERICA, as general agent, is a subsidiary of its parent, HAMBURG SUDAMERIKANISCHE.

2. Plaintiff/petitioner HAMBURG-SUD BRASIL, is a company duly registered with the Corporate Taxpayer Bureau of Brazil, with an office or agent at 3 Rua Visdonde do Rosario, 3rd andar, sala 3011, Comercia, Salvador, Bahia, Brazil. HAMBURG-SUD BRASIL LTDA, is also affiliated with, and a subsidiary serving as general agent in Brazil to its parent, HAMBURG SUDAMERIKANISCHE.

3. Plaintiff/petitioner HAMBURG SUDAMERIKANISCHE, is a German corporation or business entity, with an office and principal place of business at Willy-Brandt-Strasse 59-61, 20457 Hamburg, Germany, is the parent of the plaintiffs HAMBURG-SUD NORTH AMERICA and HAMBURG-SUD BRASIL, and acted as the ocean carrier of these defendants' goods pursuant to the aforesaid contract of carriage.

4. Upon information and belief, defendant/respondent BOMIX is a foreign corporation, with an office and principal place of business at Av. Aliomar Baleero, No. 1111, Jd. Cajazeiras 41230-455, Salvador/BA, Brazil, and at all material times, transacted business within the State of New York pursuant to the New York Civil Procedure Law Rule 302(a)(1), is subject to and within the personal jurisdiction of this Court pursuant thereto and pursuant to F.R.C.P. Rule 4(K)(2) (A) and (B), and also was, at all material times, the "merchant" as defined by and within the Terms and Conditions of the HAMBURG-SUD NORTH AMERICA bill of lading, so as to be bound by those terms and conditions.

JURISDICTION

5. This action is an admiralty and maritime cause within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure, and is within this court's jurisdiction pursuant to 28 U.S.C. § 1331 (i).

6. This action and petition for Declaratory Judgment arises out of and is directly related to the business transacted by Defendant/Respondent BOMIX within the State of New York within the meaning of the New York C.P.L.R. Rule 302(a)(1), and F.R.C.P. Rule 4(K)(2)(A) and (B). Upon information and belief, Defendant BOMIX also transacted ancillary business with BRASIL CARGO SERVICES, which acted as agent for AMERICAN INDEPENDENT LINE in Brazil in connection with the same transaction or occurrence (the ocean transportation of BOMIX' goods), which is the subject matter of Plaintiffs' cause of action, and BOMIX is therefore subject to the personal jurisdiction of this Court on that basis, pursuant to New York C.P.L.R. Rule 301 and B.C.L. Rule 1314.

7. BOMIX is also subject to the personal jurisdiction of this Court pursuant to F.R.C.P. Rules 4(k)(2)(A) and (B), in that this claim arises under federal law, BOMIX is not subject to jurisdiction in any state's courts of general jurisdiction and since BOMIX regularly transacts

business in the United States, and, in its action against these plaintiffs in Brazil, it relies on the contract of carriage which was formed in the United States, as more fully described below, and, additionally, exercising jurisdiction over BOMIX is consistent with the Constitution and laws of the United States.

NATURE OF THE ACTION

8. The nature of this complaint is a proceeding for a declaratory judgment under § 2201 of the Judicial Code (28 U.S. C. § 2201), for the purpose of determining a question in actual controversy between the parties, namely the question of the validity of certain Terms and Conditions of a written contract between the parties for services provided by the plaintiffs to the defendants in connection with the ocean transportation of Defendant BOMIX' goods.

9. The written contract upon which this complaint/petition is based is the HAMBURG-SUD bill of lading number SUDU280017845018 dated December 7, 2008, which provided for the transportation of BOMIX' goods from the Port of Baltimore, Maryland, for discharge at the Port of Salvador, Brazil. AMERICAN INDEPENDENT LINE is listed as the "Shipper," and BRASIL CARGO SERVICES is shown as the "Consignee" in said Contract of Carriage (Exhibit "1" annexed hereto), and they are thereby also "merchants" as defined by the Terms and Conditions of that contract. AMERICAN INDEPENDENT LINE and/or BRASIL CARGO SERVICES, in turn contracted directly with BOMIX for the transportation of BOMIX' goods, as aforesaid, pursuant to AIL House bill of lading No. AILW8644992.

10. BOMIX, as the receiver, owner or person entitled to take possession of the cargo which was transported under the HAMBURG-SUD bill of lading is also a "Merchant" as defined by the Terms and Conditions of that contract of carriage, and is thereby bound by those Terms and Conditions.

THE CONTRACT OF CARRIAGE

11. The bill of lading or contract of carriage between the Plaintiff/Petitioner under which the Defendant/Respondents goods were shipped provides, among other terms, the following:

> 1. **Definitions**
>
> a) "Carrier" means Hamburg Sudamerikanische Dampfschiffahrts Gesellschaft KG, Willy-Brandt Strabe 59, 20457 Hamburg, Germany, Commercial Register: Amtsgericht Hamburg HRA59448.
>
> e) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.
>
> **2. Carrier's Tariff(s)**
>
> Goods carried hereunder are subject to all terms and conditions of Carrier's (see Clause 1.a)) applicable tariff(s), including those on file with a regulatory body whose rules govern all or a particular portion of the carriage. Copies of the tariff(s) or relevant provisions thereof are obtainable from the Carrier or regulatory body concerned on request. In the event of a conflict between the terms and conditions of such tariff(s) and the Terms and Conditions of this Bill of Lading, those of this Bill of Lading shall prevail, except as may be otherwise provided herein.
>
> **3. Responsibility: Port to Port and Multimodal Transport: Applicable Legislation**
>
> (a) Except as otherwise noted herein, including, but not limited to, Clause 12 hereof, and insofar as applicable law permits, the Carrier shall be responsible for Goods under the following circumstances only:
>
> (1) Port to Port Shipment;
>
> The Carrier shall be responsible for the Goods from the time received at Port of Loading until delivered at Port of Discharge unless compulsorily applicable law provides otherwise.
>
> (b) Where this Bill of Lading covers a shipment to, through or from a U.S. port or place, but subject to Clause 20,

> hereof. COGSA shall govern, not only tackle-to-tackle, but during the Carrier's entire period of responsibility hereunder.
>
> **16. Limitation of Liability**
>
> Carrier's limitation of liability is applicable pursuant to above Clause 3, hereof. The limitation shall conclusively apply to a Container, whether furnished and/or stuffed by the Carrier which is characterized as a "package" or is rated lump sum, unless the nature and value of the Goods have been declared by the Merchant prior to shipment and inserted in the box "Declared value" and extra freight paid if required. In no event shall the limitation amount exceed the declared value and nothing herein shall be construed as a waiver of limitation.

12. HAMBURG-SUD's tariff, as filed, contains the same or similar Limitation of Liability provisions as Clause 17. of the bill of lading Terms and Conditions, and notice that the U.S. COGSA shall govern where the bill of lading covers a shipment to, through or from a U.S. port or place. It also specifies that where COGSA applies, the Carrier's liability is limited to $500 per package.

U.S. COGSA

13. Since the Hamburg-Sud contract of carriage or bill of lading covers a shipment from the port of Baltimore, Maryland, as later described herein, the United States Carriage of Goods by Sea Act, 46 U.S.C. §30701 (notes) hereafter "COGSA", governs the rights, duties, responsibilities and immunities of the Plaintiff/Petitioners and the Defendant/Respondents herein pursuant to the Responsibility section of the contract of carriage, and by statute, of its own force and effect.

14. Filing its tariff with the U.S. Federal Maritime Commission, and including notice of its tariff within its bill of lading Terms and Conditions also constitutes actual and constructive notice of the tariff provisions to defendant BOMIX.

15. COGSA 46 U.S.C. § 30702 entitled "Application" provides the following:

> (a) **In General.**- Except as otherwise provided, this chapter applies to a carrier engaged in the carriage of goods to or from any port in the United States.

16. COGSA 46 U.S. C. § 30701 notes § 1(a) and 1(e) entitled "Definitions" provide:

> (a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

17. COGSA 46 U.S. C. §30701 notes § 2 (formerly 46 U.S. C. § 1302) entitled "Duties and rights of carrier" provides:

> Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

18. COGSA 46 U.S.C.§30701 (notes § 5, formerly 46 U.S.C. § 1304 (5) entitled "Rights and immunities of carrier and ship" provides, in relevant part:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

19. Despite actual and constructive notice of the Limitation of Liability provisions contained in the U.S. Carriage of Goods by Sea Act ("COGSA") and Clause 17. of the contract of carriage, the nature and value of BOMIX' goods were not declared by BOMIX prior to shipment, and inserted in

the "Declared Value" box of HAMBURG-SUD's bill of lading, nor was extra freight paid for the ocean carriage of BOMIX' goods.

THE CONTROVERSY

20. Defendant/Respondent BOMIX disputes and objects to the validity and enforceability of the Definitions, the Responsibility and the Limitation of Liability provisions contained within the Terms and Conditions sections of the contract of carriage (Exhibit "1" ¶¶ 1,3 and 16), as well as the applicability and enforceability of §30701, Note §§ (5) of COGSA.

21. Specifically, BOMIX, the ultimate consignee and receiver and owner of the goods shipped under the contract of carriage, disputes and denies that the U.S. COGSA governs the plaintiff carrier's rights, duties, responsibilities, immunities, defenses and limitations during the period of the carrier's responsibility for the goods shipped under the contract, and/or that the carrier shall not in any event be liable for any loss or damage to or in connection with transporting the shipper's goods in excess of $500 per package or customary freight unit.

UNDERLYING FACTS

22. On or before December 7, 2008, plaintiff HAMBURG-SUD AMERIKANISCHE chartered space on the ocean vessel LIBRA CORCOVADO, which was then owned and operated by CSAV Lines, a foreign ship owning corporation, for the purpose of acting as ocean carrier of goods to be shipped by customers of plaintiff, HAMBURG -SUD AMERIKANISCHE, including AMERICAN INDEPENDENT LINE and BRASIL CARGO SERVICES.

23. Geodis Wilson USA, Inc. ("Wilson USA"), as agent for the manufacturer of BOMIX' goods, upon information and belief, an American company known as Milacron Marketing Company or Milacron, G.W., engaged AMERICAN INDEPENDENT LINE, a non-vessel operating common carrier ("NVOCC")[1] to arrange transport of two packages industrial machinery from Baltimore,

[1] NVOCC "means a common carrier that—(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean carrier." 46 U.S.C. §40120.

Maryland to Salvador, Brazil: one 40' flatrack container (container no. SUDU 970-013-3) containing a plastic injection molding machine, Milacron Powerline Model NT550-54, and one 20' standard container (container no. IPXU 399 852-5) also containing a plastic injection molding machine, Milacron Powerline Model NT 550-54 for delivery to BOMIX, the purchaser of the machinery in Salvador, Brazil.

24. AMERICAN INDEPENDENT LINE then issued its bill of lading no. AMERICAN INDEPENDENT LINEW8644992, dated December 7, 2008 for carriage of the two packages, with Wilson USA listed as the shipper and GW Gerenciamento De Fretes – Brazil, upon information and belief, a subsidiary of Wilson USA, as the consignee. BRASIL CARGO SERVICE was indicated as the notify party, while BOMIX was listed in the marks and container nos. box on the face of the AMERICAN INDEPENDENT LINE bill of lading.

25. Upon information and belief, BRASIL CARGO SERVICE was, at all material times, acting as agent for AMERICAN INDEPENDENT LINE in Brazil for the services provided in connection with the contract issued by AMERICAN INDEPENDENT LINE as its bill of lading No. AIL8644992, dated December 7, 2008, a contract of carriage which also provided for the transportation of the goods belonging to the Defendant BOMIX from the port of Baltimore, Maryland for discharge at the port of Salvador, Brazil. Annexed hereto as Exhibit "2" is a copy of AMERICAN INDEPENDENT LINE's bill of lading AIL8644992.

AMERICAN INDEPENDENT LINE'S BILL OF LADING

26. AMERICAN IINDEPENDENT LINE's bill of lading provided the following terms, among others:

> 1. **(Definitions)** When used in this Bill of Lading (A) "Ocean Carrier" means American Independent Line, Inc., which performs the sea carriage of the Goods, and the vessel, her owner, and demise charterer, whether any of the preceding parties is acting as carrier or bailee.

****

(E) "Merchant" includes the shipper, consignor, consignee, owner, and receiver of the Goods and the holder of this Bill of Lading.

(F) "Goods" means the cargo described on the face of this Bill of Lading and, if the cargo is packed into container(s) supplied or furnished by or on behalf of the Merchant, include the container(s) as well.

****

2. **(Clause Paramount)**...(B) If this Bill of Lading covers Goods moving to or from ports of the United States in foreign trade, then carriage of such goods shall be subject to the provisions of the United States Carriage of Goods by Sea Act, 1936, 46 U.S.C. P1300-1315 as amended (hereinafter "U.S. COGSA"), the terms of which shall be incorporated herein. The provisions of the U.S. COGSA shall (except as otherwise specifically provided in this Bill of Lading) govern throughout the time when the Goods are in the custody of the Ocean Carrier and any other water carrier and as otherwise provided in this Bill of Lading.

26. **(Limitation of Liability)** (A) Subject to subpart (B) below for the purpose of determining the extent of the Ocean Carrier's liability for loss of or damage to the Goods, the Merchant agrees that the value of the Goods is the Merchant's net invoice cost, plus freight and insurance premium, if paid. The Ocean Carrier shall not be liable for any loss or profit or any consequential loss. (B) Insofar as the loss of or damage in an amount exceeding the minimum allowable per package or unit in the applicable version of the Hague Rules, which when U.S. COGSA is applicable is an amount not exceeding U.S. $500 per package or customary freight unit, unless the value (and nature) of Goods higher than this amount has been declared in writing by the Merchant before receipt of the Goods by the Ocean Carrier and inserted on the face of this Terms & Conditions and extra freight has been paid as required. If the actual value of the Goods per package or unit exceeds such declared value, the value shall nevertheless be deemed to be the declared value, and the Ocean Carrier's liability, if any, shall not exceed the declared value. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value. If the declared value has been willfully misstated or is markedly higher than the actual value, the Ocean Carrier shall not be liable to pay any compensation. 26. Where the cargo has been packed into a container unitized into a

> similar article of transport by or on behalf of the Merchant, it is expressly agreed the number of such containers or similar articles of transport shown on the face of this Terms & Conditions shall be considered as the number of the packages or units for the purpose of the application of the limitation of liability provided for in this Article.
>
> 32. **(Ocean Carrier's Tariff)**This Terms & Conditions is subject to the Ocean Carrier's applicable tariff. Copies of the applicable tariff are obtainable from the Ocean Carrier upon request.

27. Despite actual and constructive notice of the Terms and Conditions contained in AMERICAN INDEPENDENT LINE's bill of lading, as well as the provisions of the U.S. COGSA, the nature and value of BOMIX' goods were not declared by BOMIX prior to shipment and inserted in the "Declared Value" box of AMERICAN INDEPDENT LINE's bill of lading, nor was extra freight paid for the ocean carriage of BOMIX' goods.

28. As described in Exhibit "1", and in the AMERICAN INDEPENDENT LINE bill of lading AIL8644992, the defendant's goods comprised two (2) packages: one (1) box plastic injection molding machine stowed in one (1) 20 foot container number IPXU38998525 and one (1) box plastic injection molding machine stowed in one (1) 40 foot container number SUDU9700133.

29. AMERICAN INDEPENDENT LINE in turn contracted with plaintiff HAMBURG-SUD NORTH AMERICA, as general agent for Hamburg-Sud Amerikanische, to provide ocean carriage of the two packages aboard the vessel LIBRA CORCOVADO. HAMBURG-SUD NORTH AMERICA, as general agent, issued bill of lading no. SUDU280017845018, dated December 7, 2008 (Exhibit "1"), for transporting two packages listing AMERICAN INDEPENDENT LINE as the shipper and BRASIL CARGO SERVICES, acting as AMERICAN INDEPENDENT LINE's agent in Brazil, as the consignee, and Wilson USA as the Forwarding Agent on the bill of lading.

THE CASUALTY

30. After the defendants' goods were loaded on board the vessel LIBRA CORCOVADO, the vessel sailed from Baltimore on December 7, 2008, and while calling at the intermediate port of Norfolk, Virginia, an accident occurred involving the 40' flatrack container SUDU970013-3, such that the defendants' goods were caused to suffer damage, through no fault, negligence or want of due care on the part of the HAMBURG-SUD plaintiffs.

31. Upon information and belief, after sustaining damage while at the port of Norfolk, the defendants' goods which were stowed in container SUDU970-013-3 were returned to the defendant AMERICAN INDEPENDENT LINE, as shipper on the HAMBURG-SUD bill of lading, which then returned the damaged molding injection machine to the manufacturer, Milacron, while the goods which were stowed in container IPXU399852-5 were transported to Salvador, Brazil, and discharged from the vessel on or about January 5, 2009, where delivery of these goods was tendered to the consignee and receiver or purchaser, BRASIL CARGO SERVICES and BOMIX, respectively.

32. On information and belief, BRASIL CARGO SERVICES and BOMIX refused to take delivery of container IPXU399852-5 when delivery was tendered to them at Salvador, Brazil.

THE LAWSUIT IN BRAZIL

33. On the 12th day of April 2010, defendant BOMIX filed suit in the Civil and Commercial Consumer Transactions division of Judicial District Court of the State of Salvador, Brazil against HAMBURG-SUD BRASIL LTDA, as ocean carrier, MILACRON EQUIPAMENTOS PLASTICOS LTDA., as seller of the goods, and GM GERENCIAMENTO as shipper. Annexed hereto as Exhibit "3" is a copy of a free translation of the Complaint and Points of Claim filed by BOMIX against HAMBURG-SUD BRASIL, LTDA., MILACRON EQUIPAMENTOS PLASTICOS LTDA., and GM GERENCIAMENTO in the Judicial District Court of the State of Salvador, Brazil.

34. Among its Points of Claim BOMIX has alleged that Hamburg-Sud Brasil is strictly liable for the loss and damage to BOMIX' machinery, as aforesaid, in the total amount of Five Hundred Twenty-Three Thousand, One Hundred Forty Nine U.S. dollars and Sixty One Cents (US $523,149.61) plus an additional sum for Loss of Profit, Moral Damage and Attorneys' Fees, resulting in a total claim against Hamburg-Sud Brasil in the amount of Two Million Brazilian Reals (R$2,000.,000.00), without limit.[2]

35. In its Brazilian action, defendant BOMIX states its theory of liability of the HAMBURG-SUD defendants as a breach of the duties and responsibilities imposed on HAMBURG-SUD by its bill of lading, and the contract of carriage it issued: (Exhibit "3"):

> 2.2.2- THE CIVIL STRICT LIABILITY's PORTION OF THE SECOND AND THIRD DEFENDANTS. CONTRACT OF CARRIAGE. OBLIGATION TO INDEMNITY.
>
> According to the explanation of the defendants' joint and strict liability for the damages caused to the applicant, it is absolutely necessary to call the attention of this Honorable Court to the liability of the second and third defendants, as explained as follows. The contract of carriage covenanted by the defendants is a contractual modality of result, as it obligates the carrier (second and third defendants) to proceed with the transport of things or persons to a correct destination, and the effectiveness thereof will only occur when the thing or person is delivered to the final addressee (claimant) and under perfect conditions. (Exhibit "3")

36. In the Brazilian action defendant BOMIX also expressly contends and acknowledges that, although the carrier is alleged to be strictly liable for loss or damage to BOMIX' merchandise, the carrier's liability is limited to the amount stated on the bill of lading.

> Points of Claim 2.2.2
>
> Following the same line of thought, Silvio de Salvo Venosa teaches us as follows: "The carrier is liable for

[2] According to the August 14, 2015 Wall Street Journal, 2.0013 Brazil Reals equal 1 U.S. dollar.

> losses and damage to the thing, as long as the risk is not attributed to the sender. The carrier's liability is strict"
>
> It must be reiterated that in the bill of lading (B/L) issued on the occasion of the shipment there were no exceptions/remarks, which deems the goods as received, in good condition and duly packed for ocean carriage.
>
> In effect, it is reinforced that art. 750 of the Civil Code of 2002 determines the unquestionable commencement and end of the carrier's civil liability when setting forth as follows:
>
> Art. 750 – The carrier's liability, which is limited to the amount stated on the bill of lading, commences at the moment at which he, or his representatives, receive the thing; it terminates when the thing is delivered to the consignee, or deposited into court, if the consignee is not found." (Exhibit "3") (emphasis added).

37. Despite this express acknowledgement of the limitation of the carrier's liability to the amount stated in its bill of lading, BOMIX is demanding judgment against the Hamburg-Sud Plaintiff/Petitioners in the total amount of Two Million Brazilian Reals, including loss and damage to its goods, loss of profit, "moral damage" and attorneys fees, as aforesaid, without limit.

38. BOMIX specifically alleges and acknowledges that it regularly transacts business it has prior ("business habitualness") and has purchased equipment from manufacturers in the United States prior to the subject shipment, and was familiar with the customary provisions of contracts of carriage from the United States to Brazil:

> Point of Claim 2.2.1
>
> On the other hand, since claimant had already made other trade operations of this kind, involving as well the contract of carriage as a means for the forwarding of products/goods to Brazil, it did not hold itself in covenanting the contract object of this litigation, in view of the business habitualness of this type of contract by the claimant without any past hindrances. (Exhibit "3)

39. BOMIX also alleges and acknowledges that its rights against the ocean carrier of its goods may be and are governed by such International Conventions as the 1978 Hamburg Rules and/or the 1968 Hague/Visby Convention, both of which contain provisions under which an ocean carrier may limit its liability, similar to the U.S. Carriage of Goods by Sea Act, although differing in the method by which the carrier's limitation is calculated[3]

> Point of Claim 2.2.2.1 CIVIL LIABILITY IN SEA CARRIAGE ACCORDING TO INTERNATIONAL LAW.
>
> Notwithstanding the application of the Brazilian law in the situation at hand, in accordance with the application of the civil strict and joint liability of the respondents, it is sensible to mention the international rules disciplining the civil liability of carriers of which Brazil is signatory, clarifying any misconception that may still exist on the topic. Here they are: As a matter of example, we call the attention of this honorable Court to the historical analysis of international rules disciplining the matter under reference, being the first international rule to be mentioned with respect to maritime law the Hague Rules, a pillar of the Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading, born in 1924 in The Hague, The Netherlands.
>
> Later, such rules underwent changes, and in 1968 the International Maritime Committee made amendments to them and they started then being called the Hague-Visby Rules provide in article one on the international sea carriers' liability with respect to goods transported, adding that the carrier is liable for the merchandise from the time of shipment until discharge thereof from this ship, in accordance with the same line of reasoning of art. 750 of the Brazilian Civil Code. (Exhibit "3")

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[3] Both Hague-Visby and Hamburg provide for limitations of the carrier's liability for damage to goods to be calculated on the basis of the weight of the goods. Please see, e.g. Hague-Visby Rule 5 (a):

> "(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher."

The "units of account" pursuant to the 1979 Hague-Visby Special Drawing Rights (SDR) Protocol is the special Drawing Right as established by the International Monetary Fund.

40. Annexed hereto (as Exhibit "4") is the Affirmation of Camila Mendes Vianna Cardoso, a lawyer associated with the Brazilian Law Offices of Carl Kincaid, who are representing the interests of HAMBURG-SUD BRASIL in the lawsuit brought by BOMIX in Salvador, Brazil. The Cardoso affirmation verifies and explains the Hamburg-Sud Plaintiff/Petitioners' allegations herein concerning their exposure to joint and several strict liability to BOMIX, without limit, as a result of the pending BOMIX lawsuit in Brazil.

41. Upon information and belief, in their reply and response to the BOMIX' suit and Points of Claim in the Judicial District Court of the State of Salvador, Bahia, defendants MILACRON and GERENCIAMENTO have denied all liability for the loss of or damage to BOMIX' goods, and have alleged by cross points of claim that any liability or judgment which is found by that court to exist for the loss or damage to BOMIX' goods should be borne, in full and without limit, by HAMBURG-SUD BRASIL.

THE INSTANT CROSS CLAIMS

42. Plaintiff/Petitioners are also entitled to enforce the Limitation of Liability provisions contained in the HAMBURG-SUD AMERIKANISCHE bill of lading (Exhibit "1") and the U.S. COGSA in defense of any such claims for liability or indemnification which may be brought or alleged against the Hamburg-Sud Plaintiff/Petitioners by MILACRON or GERENCIAMENTO in the Brazilian suit by BOMIX.

RELIEF SOUGHT

43. Where there is a controversy as to the meaning and effect of a written contract, a party to the contract may seek interpretation by means of declaratory judgment of a court having jurisdiction over the parties.

44. A proceeding in the nature of declaratory judgment is a form of remedial procedure which is particularly appropriate where the basic issue underlying the claim of the plaintiff is the interpretation or construction of a contract.

45. The issue presented by this proceeding is whether Plaintiff/Petitioners are entitled to limit their liability for any damage or loss to BOMIX' goods to the U.S. COGSA $500 per package or customary freight unit of the goods shipped, pursuant to the Terms and Conditions of the HAMBURG-SUD AMERIKANISCHE bill of lading and the U.S. COGSA, 46 U.S.C. § 30701 note § 5.

46. BOMIX' position that Brazilian civil law applies to its claim for cargo damage to the exclusion of COGSA's limitation of liability, including 46 U.S.C. § 30701, note (5), although expressly incorporated in the HAMBURG-SUD contract of carriage, upon which BOMIX relies, and the alleged positions of MILACRON and GRENECIAMENTO that Hamburg-Sud's liability for such cargo damage is without limit, presents matters of actual controversy by and among the parties and raises a question of the validity and enforceability of the entire contract of carriage, thereby entitling the HAMBURG-SUD Plaintiff/Petitioners to the relief sought.

WHEREFORE, plaintiff/petitioners demand a declaratory judgment pursuant to 28 U.S.C. § 2201, finding that the HAMBURG-SUD contract is wholly valid and enforceable to determine the rights, duties, responsibilities and immunities of the Plaintiff/Petitioners and the Defendant/Respondents herein, and that the "Definitions," the "Carrier's Responsibilities," and the "Limitation of Liability" provisions of the Terms and Conditions of the contract of carriage, as well as 46 U.S.C. §30701 of COGSA are valid and enforceable against the defendant BOMIX, or any other "merchant" as that term is defined within the Terms and Conditions of the HAMBURG-SUD bill of lading, and that Plaintiff/Petitioners are entitled to judgment and a declaration that any and all liability for which they may be found for the loss or damage to BOMIX' goods may be, and hereby is, limited to ONE THOUSAND U.S. DOLLARS ($1,000.00), comprising the $500 per package limitation provided by COGSA § 30701, Note § 5 for each box or package of the defendants goods which were shipped under the HAMBURG-SUD AMERIKANISCHE contact of carriage.

Dated: New York, New York
August 14, 2015

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TO: BOMIX INDUSTRIA DE EMBALAGENS LTDA.
Av. Aliomar Baleero, No. 1111, Jd.
Cajazeiras 41230-455, Salvador, Brazil

ATTORNEY VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES E. RYAN, being duly sworn, deposes and states:

That deponent is an attorney at law with the firm of DOUGHERTY, RYAN, GIUFFRA, ZAMBITO & HESSION, attorneys for Plaintiffs, HAMBURG-SUD NORTH AMERICA, INC. HAMBURG-SUD BRASIL LTDA and HAMBURG SUDAMERICANISHE DAMPFSCHIFFAHRTS GESELLSCHAFT, KA, in the within action; that he has read the foregoing Verified Complaint for Declaratory Judgment to Determine Enforceability of Contract Terms and Conditions, and is familiar with the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

That the source of deponent's knowledge and the grounds of his belief are information received from the Plaintiffs and their agents, and books, records and documents in their possession.

James E Ryan
JAMES E. RYAN

Sworn to before me this
14th day of August, 2015

Jessica Martinez
Notary Public

JESSICA MARTINEZ
Notary Public, State of New York
No. 01MA6077594
Qualified in Bronx County
Commission Expires July 15, 2018